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In the

Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS *ex rel.* JAMES E. RYAN, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,

Petitioner,

v.

TELEMARKETING ASSOCIATES, INC., RICHARD TROIA and ARMET, INC.,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the First Amendment categorically prohibits a State from pursuing a fraud action against a professional fundraiser who represents that donations will be used for charitable purposes but in fact keeps the vast majority (in this case 85 percent) of all funds donated.

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The opinion of the Illinois Supreme Court is reported at 198 Ill. 2d 345 and 763 N.E.2d 289. Pet. App. 1-17. The opinion of the Illinois Appellate Court is reported at 313 Ill. App. 3d 559 and 729 N.E.2d 965. Pet. App. 19-29. The final judgment of the Illinois Circuit Court is unreported. Pet. App. 30-31.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1257(a). The judgment of the Illinois Supreme Court was entered on November 21, 2001. The Illinois Supreme Court denied the petitioner's timely petition for rehearing on February 2, 2002. Pet. App. 18. On April 25, 2002, Justice Stevens extended the time within which to file a petition for writ of *certiorari* to June 5, 2002. Petitioner on June 5, 2002 filed the petition for a writ of *certiorari*, which the Court granted on November 4, 2002.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. Const. amend. I.

STATEMENT OF THE CASE

Introduction

Telemarketing Associates, Inc. ("Telemarketing") is a for-profit company engaged in the business of telephoning people at home and asking for donations on behalf of various not-for-profit organizations. J.A. 2, 7, 8, 11. One of these organizations is VietNow, Inc., whose national headquarters is in Illinois. J.A. 3. Telemarketing calls individuals to ask for donations to VietNow, telling them that their contributions will be used for specific charitable purposes, including providing food, shelter and financial support for hungry, homeless and injured Vietnam War veterans. J.A. 107-194. In fact, pursuant to its agreements with VietNow, Telemarketing keeps 85 percent of the donations it generates. J.A. 3, 5, 84.

Petitioner, the People of Illinois *ex rel.* James E. Ryan, the Illinois Attorney General (the "State," or "Illinois"), sued Telemarketing, its owner, Richard Troia, and Armet, Inc., another company owned by Troia (collectively "Respondents"), alleging common law fraud as well as violations of several state anti-fraud statutes. J.A. 9, 10, 86-87. The State's complaint alleged that Respondents' representations to donors about how their contributions to VietNow would be used were false and misleading in light of Respondents' retention of 85 percent or more of those donations, J.A. 88, 103; that Respondents were aware of the deceptive nature of their representations, but nonetheless made them for the purpose of inducing people to make contributions for Respondents' financial gain, J.A. 86, 105; and that donors relied on the misleading impression created by Respondents' representations about how contributions would be used, J.A. 87, 104, 107-94, with the result that over the course of a number of years Respondents received more than $7 million donated to VietNow for the charitable purposes described to donors but turned over only about $1 million to VietNow. J.A. 3, 84.

Attached to the State's complaint are the affidavits of 44 donors identifying what they were "told [their] donation would be used for" (*e.g.*, providing rehabilitation services, job training, food baskets and financial support to disabled, homeless and unemployed veterans and their families), and affirming that they did not know—and would not have made a contribution if they had known—"that 80% or more of [their] donation would be used for professional fund raising expenses and that only 20% or less would go to VietNow." J.A. 107-94.

On Respondents' motion, the Circuit Court of Cook County, Illinois, dismissed the State's fraud claims as barred by the First Amendment. Pet. App. 30-31. The Illinois Appellate Court and the Illinois Supreme Court affirmed, holding that the State could prove no set of facts that would entitle it to relief consistent with the First Amendment. Pet. App. 1-29. This Court granted *certiorari* to review the constitutional question presented.

Allegations of the Complaint

The State's complaint alleged the following facts. Respondents Telemarketing and Armet are for-profit corporations wholly owned and controlled by Troia. J.A. 2. Before VietNow was organized as a not-for-profit corporation, it entered into a contract with Telemarketing to conduct fundraising activities on its behalf. J.A. 14, 20; Record 27-28. Telemarketing thereafter conducted ongoing fundraising campaigns for VietNow pursuant to successive contracts. Under every one of those contracts, covering a 13-year period, VietNow was entitled to receive only 15 percent of the money raised in its name, and Telemarketing kept the remaining 85 percent. J.A. 3, 94.

As part of their fund-raising activities, Respondents sometimes contracted with other individuals and entities, including other companies owned and controlled by Troia.

J.A. 103. Persons calling people at home to ask for contributions to VietNow often received up to 70 percent or more of every donation they generated. J.A. 7-8. Troia also set up additional VietNow chapters in other states for which Respondents raised money in the same fashion, with Troia, through Armet, receiving a separate fee of 10 percent to 20 percent of the money raised, and VietNow's share reduced to only 10 percent. J.A. 4; Record 29-67.

Telemarketing's contracts with VietNow stated that Telemarketing was required to "promote goodwill," "enhance good public relations through [its] sales techniques," and "increas[e] public awareness and financial support for the organization." J.A. 22, 33, 91. These contracts also required Telemarketing to market advertising space for, and annually publish, a maximum of 2,200 copies of a magazine mostly containing commercial advertisements, with a dozen pages reserved for content supplied by VietNow. J.A. 22, 32, 90. Because Illinois' complaint was dismissed at the pleading stage, the record does not reflect the extent to which Respondents actually engaged in any activities on VietNow's behalf besides merely raising money.

When Respondents called potential donors asking for contributions to VietNow, they did not state that they were for-profit fundraisers, J.A. 10, and they told donors to send checks or money orders payable to VietNow. J.A. 94. Respondents then directly deposited these checks into accounts that were established in VietNow's name but were exclusively controlled by Respondents. J.A. 102. Respondents took their 85 percent or 90 percent share of these deposits (for in-state and out-of-state revenues) and remitted the remaining 15 percent or 10 percent to VietNow. J.A. 4-5, 84, 102.

After Respondents developed a donor list of people who contributed to VietNow, they called the same people in succeeding years, so that a given amount of fundraising effort generated a substantially greater amount of donations. J.A.

102-03, 111. What was turned over to VietNow, however, never changed, so that what VietNow received in the tenth year of Telemarketing's fundraising contracts was the same as it received in the first year: 15 percent of all the money raised in its name. J.A. 94, 102-03, 111. (The figures for each year after 1989, showing the revenue raised and the percentage turned over to VietNow, are set forth in the complaint and reproduced at J.A. 84.) Respondents also maintained control over the donor list and did not disclose donors' names to VietNow. J.A. 93-94, 102-03.

When Respondents called potential donors, Respondents told them, among other things, that their contributions would be used to provide support for Vietnam War veterans who were "disabled," "paralyzed," "injured," "homeless," "unemployed" or otherwise "in need." J.A. 107, 113, 117, 125, 129, 131, 133, 155, 163, 167, 171-72. Respondents further described specific types of support that would be given to needy veterans and their families, including "rehabilitation services," "job training," "food baskets" and "assistance" to help pay "rent" and other "bills." J.A. 124, 131, 133, 135, 145, 163, 169, 187, 189. In making these representations, Respondents knew, but did not tell donors, that VietNow would receive at most 15 percent of the contributions raised in its name. J.A. 86, 105. Respondents further knew that, as a result of their representations and omissions about how donations would be used, donors actually believed that "much more" of their contributions would be used for the specific charitable purposes described to them than was actually the case. J.A. 20, 87-88, 104. Respondents nonetheless made these representations and omissions for the purpose of inducing donors to contribute money for Respondents' financial gain (J.A. 86, 104); donors materially relied on the false impression created by Respondents' conduct by making contributions to VietNow (J.A. 87, 104); and donors would not have made such contributions if they had known that at most only

15 percent of their donations actually went to VietNow to be used as Respondents represented. J.A. 107-194.

Based on these allegations, the State's complaint asserted that Respondents' conduct amounted to common law fraud and also violated the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/1 *et seq.* (1996); Section 2 of the Uniform Deceptive Trade Practices Act, 815 Ill. Comp. Stat. 510/2 (1996); and section 15(b)(5) of the Illinois Solicitation for Charity Act, 225 Ill. Comp. Stat. 460/15(b)(5) (1996), which states that when fundraisers purport to relate to prospective donors the purpose for which donations are being solicited, they must "fully and accurately identif[y]" such purposes. J.A. 9, 86-87.

The complaint also alleged that Respondents, by taking possession of assets contributed for specific charitable purposes, were trustees of those assets for the benefit of the people of Illinois, and that they breached their fiduciary duty of loyalty to the people by engaging in self-dealing and devoting those assets to private purposes materially different from the specific charitable purposes for which they were donated. J.A. 3, 9, 10, 85, 105.

The State sought as relief compensatory and punitive damages, a declaration that Respondents had breached their fiduciary obligations and equitable remedies, including an accounting, injunctive relief, forfeiture of compensation and the imposition of a constructive trust on the monies they received for charitable purposes. J.A. 12-13, 88, 106.

The Illinois Supreme Court's Decision

On appeal, the Illinois Supreme Court affirmed the dismissal of the complaint. Although it "accepted as true" the State's allegations, Pet. App. 4, and applied a stringent standard of review, stating that "[d]ismissal will be held proper only if it clearly appears that no set of facts can be proved under the pleadings which will entitle the plaintiff to

recover," Pet. App. 5, it concluded that this Court's rulings in *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980), *Secretary of State of Maryland v. Joseph A. Munson Co.*, 467 U.S. 947 (1984), and *Riley v. National Fed'n of the Blind of North Carolina*, 487 U.S. 781 (1988), "compel[led]" the result it reached. Pet. App. 17.

Rejecting the State's argument that this Court specifically approved an individual fraud action like this one as a narrowly tailored means to further its interest in protecting the public from fraud, the Illinois Supreme Court held that "the Attorney General's complaint is, in essence, an attempt to regulate the defendants' ability to engage in a protected activity based upon a percentage-rate limitation [which] is the same regulatory principle that was rejected in *Schaumburg*, *Munson* and *Riley*." Pet. App. 13. Thus, the court concluded, the State's claim was "indistinguishable from the regulatory measures struck down" in those cases. Pet. App. 17. Allowing a case such as this to proceed, the court said, would have a "substantial chilling effect on protected speech" because "[f]und-raisers, therefore, would be at a constant risk of incurring litigation costs, as well as civil and criminal penalties, . . . whenever in the Attorney General's judgment the public was being deceived about the charitable nature of a fund-raising campaign because the fund-raiser's fee was too high." Pet. App. 16.

Focusing on the State's actual fraud allegations, the court acknowledged the donor affidavits referred to in the State's complaint and attached to it. Pet. App. 6. It observed, though, that "the statements made by the defendants during solicitation are alleged to be 'false' only because the defendants retained 85 percent of the gross receipts and failed to disclose this information to donors." Pet. App. 13. That premise of Illinois' complaint was inconsistent with this Court's precedents, the Illinois Supreme Court held, because "fraud cannot be defined in such a way that it places on solicitors the

affirmative duty to disclose to potential donors, at the point of solicitation, the net proceeds to be returned to the charity." Pet. App. 15. Any reliance on Respondents' 85 percent fundraising fee to prove they committed fraud, the court held, constitutes "an attempt to regulate the defendants' ability to engage in a protected activity based upon a percentage-rate limitation" and incorrectly "presume[s] that there is a nexus between high solicitation costs and fraud." Pet. App. 13, 17. Observing that Respondents' contracts provided for them to do more than just raise money, the court also found that the State's claim was tantamount to a form of "[c]ompelled disclosure . . . based on the presumption that the net proceeds returned to a charity are the only benefit that a charity derives from solicitation." Pet. App. 15.

Summarizing its decision, the court stated:

> Contrary to the Attorney General's contentions, the complaint . . . is, at its core, a constitutionally impermissible percentage-based limitation on defendants' ability to engage in a protected activity. As such, the complaint is constitutionally deficient pursuant to *Schaumburg*, *Munson*, and *Riley*.

Pet. App. 17.

The court said it was "mindful of the opportunity for public misunderstanding and the potential for donor confusion which may be presented with fund-raising solicitations of the sort involved in the case at bar." Pet. App. 17. It nonetheless declared that, in its view, that consequence is "compel[led]" by this Court's decisions in *Riley*, *Munson* and *Schaumburg*. Pet. App. 17.

SUMMARY OF ARGUMENT

The First Amendment does not give a fundraiser the right to solicit charitable donations by fraudulent means, including misrepresentations about how donated funds will be used. Deception for profit is not protected speech under the First Amendment, and this is as much the case for half-truths and other implied misrepresentations long-recognized at common law as it is for blatant lies. That such fraud is perpetrated by someone seeking money in the name of charity does not make it protected speech.

Consistent with these principles, the Court has repeatedly stated that States may vigorously enforce their anti-fraud laws against deceptive fundraising practices committed in the name of charity. States therefore may bring an individual fraud action against a professional fundraiser who represents that donations will be applied to specific charitable uses but actually keeps virtually all of the money donated. That is what Illinois properly did here.

It is firmly established under the law of fraud in Illinois and in other jurisdictions that a misrepresentation need not consist of an explicit misstatement of fact, but may include any manner of words or conduct—including an ambiguous statement or selective, partial disclosure—which reasonably implies an assertion of fact that is verifiably false. See, *e.g.*, Restatement (2d) of Torts § 525, cmt. b (1977); Dan B. Dobbs, *The Law of Torts* § 469 at 1344 (2000) ("*Dobbs*") (observing that, under the law of fraud, "[a]n implication of fact rather than an explicit statement will do."). Consistent with these principles, Illinois alleged that when Respondents told donors their contributions would be used for specific purposes, such as providing rehabilitation services, job training, food and rent money to needy veterans, the donors reasonably understood Respondents' statements to mean that much more than 15 percent of their donations would be spent by VietNow for those specific uses. Illinois further alleged that these repre-

sentations by Respondents were false and misleading in light of the exceedingly small portion of donations they actually turned over to VietNow. While the Illinois Supreme Court did not dispute that Illinois stated a valid fraud claim under state law, it erred in concluding that this claim infringed Respondents' First Amendment rights.

Although charitable solicitations constitute speech protected by the First Amendment, fraudulent charitable solicitations, like other forms of deception for pecuniary gain, are unprotected speech that government has a "substantial interest" in preventing. *Riley*, 487 U.S. at 792. That interest encompasses any words or conduct reasonably understood to represent an assertion of fact that is demonstrably untrue, not just blatant falsehoods.

An individual fraud action—in which the determination whether fraud occurred is decided after a trial based on the particular facts and circumstances of a specific case in accordance with well-established legal principles—represents a constitutionally valid, narrowly tailored means to further the substantial governmental interest in prohibiting fraudulent charitable solicitations. See, *e.g.*, *Riley*, 487 U.S. at 795, 800; *Schaumburg*, 444 U.S. at 637 n.11. Free speech interests do not, as Respondents maintain, require going beyond the normal protections afforded in such an action and providing blanket immunity for implied misrepresentations, such as deceptive half-truths, made for the purpose of obtaining donations to charity.

The public interest in preventing charitable solicitation fraud increases, and the free speech interest of fundraisers decreases, where the fundraiser's alleged misrepresentation relates to how a donation will be used. That use is often the most important factor in a person's decision to make a gift, yet donors typically have even less opportunity than consumers of goods and services to know the truth about what their money is reportedly going to obtain. Moreover, whereas a

fundraiser has the ability to obtain accurate information about the actual use of charitable donations and so can easily avoid making deceptive statements about such expenditures, donors have significantly less access to such information and, given the one-on-one nature of many charitable solicitations, are unlikely as a practical matter to obtain other information correcting any misleading representations by the solicitor before deciding to make a donation. Given these circumstances, limiting charitable solicitation fraud liability as a matter of constitutional law to explicit falsehoods is unnecessary to the protection of legitimate charitable solicitations, and instead would simply encourage the abusive exploitation of the public's desire to support charitable causes.

Contrary to the Illinois Supreme Court's ruling, the State's claim against Respondents does not improperly rely on the amount of their fee to establish that they committed fraud. *Schaumburg*, *Munson* and *Riley* held that the percentage of donations devoted to fundraising expenses cannot, *by itself*, be used to declare charitable solicitations fraudulent. These decisions did not hold that the share of donations used for fundraising expenses is categorically *irrelevant* to whether a fundraiser commits fraud. Because Respondents specifically told donors how their contributions would be used, Illinois necessarily may support its claim that these representations were materially false with evidence regarding the percentage of donations that Respondents actually turned over to VietNow and, conversely, the percentage Respondents kept. Such use of Respondents' fee as evidence to support Illinois' fraud claim is not tantamount to reliance on an unconstitutional legal "presumption" that their fee establishes fraud. Finally, the general First Amendment prohibition against "compelled speech" is not violated by Illinois' claim that Respondents committed fraud by obtaining donations for charity with deceptive half-truths about how those donations would be used.

ARGUMENT

The First Amendment Does Not Give a Person the Right to Solicit Charitable Donations with Fraudulent Misrepresentations About How Donated Funds Will Be Used.

Fraudulent charitable solicitations are not protected speech under the First Amendment, but instead represent speech the Government has a substantial interest in prohibiting. Individual fraud actions, in which well-established legal principles are applied to the particular facts and circumstances of a given case, are a narrowly tailored means to accomplish this objective. These principles fully apply where charitable donations are solicited with deceptive half-truths or similar misrepresentations about how donations will be used.

The State's complaint alleges that Respondents, for the purpose of inducing people to give money to VietNow, told them a number of specific things about how their donations would be spent. As particularly set forth in the affidavits referred to in the body of the complaint and attached to it, Respondents represented to donors that the money they were being asked to donate would be used to furnish assistance to disabled, homeless, unemployed and other needy Vietnam War veterans and their families by providing them with rehabilitation services, job training, food baskets and money to pay rent and other bills. Told that their contributions would be used for these specific charitable purposes , donors justifiably believed that "much more" than 15 percent of their contributions would be spent by VietNow for those purposes. J.A. 87-88. In fact, under the terms of Respondent's contracts with VietNow, at most 15 percent of these donations would ever be delivered to VietNow, and after allowing for VietNow's own administrative expenses, the portion actually used for these purposes was likely to be substantially

less. Moreover, because the State's complaint alleges that Respondents were aware of the false impression they created and intended to induce members of the public to rely on this false impression so that Respondents could gain financially from it, what Respondents did tell donors was at best a half-truth and, under long-established legal principles, a fraudulent misrepresentation. Such deceptive misrepresentations are not protected speech, but instead unprotected fraud that the State may validly proscribe. *Riley*, 487 U.S. at 795, 800; *Schaumburg*, 444 U.S. at 637 and n.11. The Illinois Supreme Court's decision was inconsistent with these principles and should, therefore, be reversed.

I. Fraudulent Charitable Solicitations Are Unprotected Speech that Government Has a Substantial Interest in Prohibiting.

A. Deception for Profit Is Not Protected Speech Under the First Amendment.

Fraudulent charitable solicitations are not protected speech under the First Amendment. "[F]alse statements of fact . . . belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)); see also *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").

The exclusion of First Amendment protection for false statements of fact is particularly justified when they are used to deceive another person into giving up money or property, including a charitable gift. See, *e.g.*, *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S.

150, ___, 122 S. Ct. 2080, 2087-88 (2002) (acknowledging the government's ability "to protect its citizens from fraudulent solicitation") (citing *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940)); *Riley*, 487 U.S. at 800 ("the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements."); *Schaumburg*, 444 U.S. at 637 (1980) ("Fraudulent misrepresentations [by solicitors] can be prohibited and the penal laws used to punish such conduct directly") (citing, *inter alia*, *Virginia Pharmacy Bd.*, 425 U.S. at 771). As Professor Schauer has noted:

> Courts of necessity must determine the factual truth of statements when dealing with areas in which the factual falsity of written or spoken words gives rise to substantive liability. Fraud, deceit, misrepresentation and obtaining money by false pretenses are obvious examples. In each of these cases speech serves no public purpose and any claim of first amendment protection for such utterances would be frivolous.

Frederick Schauer, *Language, Truth and the First Amendment: An Essay in Memory of Harry Canter*, 64 Va. L. Rev. 263, 276 (1978).

Because fraud is one of those rare categories of speech that is unprotected *because of* its content, government has, by definition, a substantial interest in prohibiting it. This is no less true where fraud is used to obtain money in the name of charity. Squarely addressing this issue, the Court in *Riley* held: "The interest in protecting charities (and the public) from fraud is, of course, a sufficiently substantial interest to justify a narrowly tailored regulation." *Riley*, 487 U.S. at 792; see also *Schaumburg*, 444 U.S. at 637 (acknowledging the government's "legitimate interest in preventing fraud").

B. Under Long-Established Fraud Principles, Half-Truths and Other Implied Assertions of Verifiably False Facts Constitute Actionable Misrepresentations.

The strong public policy against fraud, rooted in the most basic moral principles,[1] has been recognized in the law for centuries,[2] and is currently widely reflected both in the common law[3] and in civil and penal statutes.[4] This policy extends not only to blatant lies, but also to fraud accomplished through deceptive half-truths and other misleading factual implications. There is, therefore, no legal or logical support for Respondents' contention that, "where the Fundraisers' conduct does not include *affirmative misrepresentations*, this conduct is protected by the First Amend-

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[1] See, *e.g.*, Francis Bacon, *Essays, Civil and Moral* (P.F. Collier & Son, 1914) Chap. 56, *Of Judicature* ("The principal duty of a judge is to suppress force and fraud; whereof force is the more pernicious when it is open, and fraud when it is close and disguised."); Aristotle 2, *Rhetoric*, Book 1, ch. 5 (M. Adler ed., 2d ed. 1990) ("a party to a contract may be the victim of either fraud or force").

[2] See, *e.g.*, J. Story, *Commentaries on Equity Jurisprudence*, § 186 (1884) ("*Story on Equity*"); M. Bigelow, 1 *A Treatise on the Law of Fraud on the Civil Side*, at 3-4 (1890) ("*Bigelow*"); James Kent, II *Commentaries on American Law*, Lecture XXIX.5 (1827).

[3] See *Neder v. United States*, 527 U.S. 1, 20-23 (1999); Restatement (2d) of Torts, scope note to Chap. 22; W. Keeton, *et al.*, *Prosser and Keeton on The Law of Torts* § 105 at 725-26 ("*Prosser*").

[4] See, *e.g.*, 18 U.S.C. § 1341 (mail fraud); 18 U.S.C. § 1343 (wire fraud); 18 U.S.C. § 1014 (bank fraud); 18 U.S.C. § 1001 (fraudulent statements or representations to the federal government); 15 U.S.C. §§ 45, 52 (deceptive acts or practices in or affecting commerce); 2 Model Penal Code § 223.3 ("theft by deception"), codified in Illinois at 720 Ill. Comp. Stat. 5/16-1(a)(2) (2000).

ment." (Brf. in Op. 7 (emphasis in original).) The Court should accordingly reject as unsound, and contrary to widely embraced standards of morality and social order, the notion that fraudulent charitable solicitations are unprotected speech only where they rely on explicit literal falsehoods.

Because Respondents told donors their money would be spent on specific charitable uses and in reality only a trifling amount of it was used in that fashion, it can be argued that these representations were literally false. That donors naturally assumed *some* portion would be used for other expenses does not make these representations true no matter how little was actually used as Respondents represented. It does not matter, however, whether Respondents' statements are characterized as "explicit" or "implicit" misrepresentations, as that distinction does not change their legal significance under common law fraud principles and, likewise, should not be elevated to one of constitutional significance for claims of charitable solicitation fraud. The absurdity of such a distinction is highlighted by Respondents' contention at oral argument before the Illinois Supreme Court that the First Amendment would protect them from liability even if they keep *99 percent* of all the donations they solicited. Under this view, the power reserved to States to pursue actual fraud becomes no power at all.

Although most jurisdictions define the offense of perjury to require a positive assertion of facts known by the witness to be false,[5] liability for fraud, which serves significantly different objectives, has historically been defined to reach a

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[5] See , *e.g.*, *Bronston v. United States*, 409 U.S. 352, 357-59 and n.4 (1973) (construing 18 U.S.C. § 1621); Annotation: *Incomplete, Misleading or Unresponsive but Literally True Statement as Perjury*, 69 ALR3d 993 § 3 (1976); see also S. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud and False Statements*, 53 Hastings L. J. 157, 173-98 (2001).

wider category of deceptive words and conduct, including a number of well-recognized forms of implied falsehood. As Professor Dobbs notes, under the law of fraud "[a]n implication of fact rather than an explicit statement will do." *Dobbs* § 469 at 1344 (2000); see also Restatement (2d) of Torts § 525, cmt. b.[6] Indeed, this definition of what constitutes a "misrepresentation" under the common law of fraud has been established since at least the early nineteenth century.[7]

The common elements of such implied misrepresentations are words or conduct that, in the particular circumstances present, reasonably create a misleading impression regarding a verifiably false fact. Restatement (2d) of Torts § 525, cmts. b-e; *Prosser* § 106 at 736, §109 at 775; 37 C.J.S. *Fraud* §§ 11, 12, 17 (1997); *American Law of Torts* § 32:14.[8] It is the courts' responsibility to ensure that the allegedly misleading meaning attributed to a party's words or conduct is both reasonable and sufficiently definite to be proved factually untrue; but in many cases these requirements are satisfied and a trial is necessary to determine, based on the particular

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[6] To the same effect are *Prosser* § 106 at 736-37, and 9 S. Speiser, C. Krause and A. Gans, *The American Law of Torts* §§ 32:13, 32:45 (1992) ("*American Law of Torts*").

[7] See *Bigelow* at 466-67; *Story on Equity* § 192 ("the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead, as well as by positive assertions"); James Kent, II *Commentaries on American Law*, Lecture XXIX.5.

[8] See also *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 188-89 (1948) ("Questions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds.") (citations omitted); *Bigelow* at 500-01; cf. *Federal Trade Comm'n v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 39-42 and nn.2, 4 (D.C. Cir. 1985) (Scalia, J.) (describing process under 15 U.S.C. § 45(a)(1) for ascertaining the public's actual understanding of advertisements).

events and circumstances in dispute, not only what statements were made, but also how they were *actually* understood. See 37 C.J.S. *Fraud* § 17; *Bigelow* at 140, 500-01; see also *Federal Trade Comm'n v. Colgate-Palmolive Co.*, 380 U.S. 374, 386 (1962); *Donaldson*, 333 U.S. at 189.[9] These principles are consistent with, not preempted by, the First Amendment.

If a statement is reasonably understood as implying an assertion of fact, it is not categorically exempt from being an actionable misrepresentation merely because that assertion is not made explicitly. Thus, a statement that is facially ambiguous nonetheless is treated as a misrepresentation where the meaning intended or reasonably understood in the circumstances is demonstrably false.[10] Similarly, an assertion conveying an approximate meaning constitutes a misrepresentation if the truth differs markedly from the meaning

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[9] Addressing a virtually identical issue, the the law of defamation has adopted similar principles. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990) (describing "[t]he dispositive question" as "whether a *reasonable* factfinder could conclude that the statements . . . *imply* an assertion that petitioner Milkovich perjured himself in a judicial proceeding") (emphasis added); *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984; *id.* at 331 and n.5 (Bork, J., concurring); Restatement (2d) of Torts § 563 *et seq.*; R. Sack, *Sack on Defamation* § 2.4.5 (3d ed. 1999).

[10] See Restatement (2d) of Torts § 527; 37 C.J.S. *Fraud* § 23 ("One using ambiguous language cannot escape liability for fraud on the ground that no misstatement was intended if the misleading meaning is to be reasonably inferred from the language used"); *Prosser* § 106 at 736; *Dobbs* § 471 at 1346; *American Law of Torts* § 32:14; *Bigelow* at 499-500.

reasonably understood.[11] Indeed, not everything that may be labeled an "opinion" is immune from liability, as many such opinions directly imply underlying facts.[12] A prediction or promise also may clearly imply that the author is unaware of any facts that would prevent fulfillment of the promise or prediction, in which case the statement is a misrepresentation if the author actually knows of such facts when he makes the statement.[13] It is widely recognized, too, that fraud may

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[11] See, *e.g.*, *Dobbs* § 478 at 1366 (noting that statements in the form of an approximation are "not actionable so long as they are what they purport to be—approximately correct" and "do[] not exceed the tolerance for error the parties expect"); *Bigelow* at 470-72. On this point, *Bigelow* notes (at 470):

> The rule indeed of certainty in the representation is not to be understood in mathematical sense; it is not necessary that there should be absolute certainty in the form or matter of the representation. If there be practical certainty, that is enough; the real consideration is whether, of itself, the representation is such as would be apt to induce action on the part of the average man.

Thus, to the extent Respondents' claim rests on the proposition that nothing is false which is partially true, in however small a degree (see above at 16), it is not supported by the common law.

[12] Restatement (2d) of Torts § 539; *Bigelow* at 472-83; *Dobbs* § 477; 37 C.J.S. *Fraud* § 13 a.; cf. *Milkovich*, 497 U.S. at 18 ("expressions of 'opinion' may often imply an assertion of objective fact").

[13] See, *e.g.*, Restatement (2d) of Torts § 525, cmt. f; *id.* § 530; *American Law of Torts* § 32:17; 37 C.J.S. *Fraud* §§ 14 b, 15; *Bigelow* at 473-77, 483-86; *Burland v. United States*, 161 U.S. 306, 313-14 (1896) (construing mail fraud statute then in effect to include promises made with no present intent to fulfill them); *United States v. O'Boyle*, 680 F.2d 34, 36 (6th Cir. 1982); 2 Model Penal Code and Commentaries § 223.3, cmt. b at 187-190 (1980) (describing crime of false pretenses based on sham promises).

arise from statements that are literally true. While mere silence is generally insufficient to establish fraud, one who speaks is not free to make a selective disclosure of facts that creates a false impression in light of other information withheld.[14] This principle is specifically recognized in Illinois,[15] in other states,[16] and in numerous federal court decisions.[17] In all of these cases, well-established law classifies

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[14] See Fleming James, Jr. and Oscar S. Gray, *Misrepresentation—Part II*, 37 Md. L. Rev. 488, 523-26 (1978); Restatement (2d) of Torts § 529; *Prosser* § 106 at 736-38; *Dobbs* § 481 at 1375; *American Law of Torts* §§ 32:16, 32:47, 32:71; 37 C.J.S. *Fraud* §§ 21, 24; *Bigelow* at 503-04; *United States v. O'Boyle*, 680 F.2d at 36.

[15] See, *e.g.*, *In re Witt*, 145 Ill. 2d 380, 390, 583 N.E.2d 526, 531 (1991); *Glazewski v. Coronet Ins. Co.*, 108 Ill. 2d 243, 250, 483 N.E.2d 1263, 1266 (1985); *People v. Gilmore*, 345 Ill. 28, 46, 177 N.E.2d 710 (1931); *Buechin v. Ogden Chrysler-Plymouth, Inc.*, 159 Ill. App. 3d 237, 247-48, 511 N.E.2d 1330, 1336 (1987).

[16] See, *e.g.*, *Bond v. Graf*, 163 Or. 264, 272-73, 96 P.2d 1091, 1094-95 (1939); *Associated Indem. Corp. v. Del Guzzo*, 195 Wash. 486, 509-10, 81 P.2d 516, 526 (1938); *Ottinger v. Bennett*, 203 N.Y. 554, 555, 96 N.E. 1123, 1124 (1911); *Murphy v. McIntosh*, 199 Va. 254, 260-62, 99 S.E.2d 585, 589-91 (1957); *Sullivan v. Ulrich*, 326 Mich. 218, 227-30, 40 N.W.2d 126, 131-32 (1949).

[17] See, *e.g.*, *Bronston*, 409 U.S. at 358 n.4; *Donaldson*, 333 U.S. at 188-89 (observing that communications "as a whole may be completely misleading although every sentence separately considered is literally true"); *Equitable Life Ins. Co. of Iowa v. Halsey, Stuart & Co.*, 312 U.S. 410, 426 (1941) ("a statement of a half-truth is as much a misrepresentation as if the facts stated were untrue") (applying Iowa law); *Wiser v. Lawler*, 189 U.S. 260, 264 (1903) (characterizing as a "gross fraud" prospectuses which, while not containing a "distinct assertion" of untrue fact, necessarily "produced upon the ordinary mind" a misleading inference and were "more damaging in their omissions than in their statements").

such implied assertions of verifiably untrue facts as actionable misrepresentations.

Beyond demonstrating society's significant interest in protecting its citizens against deceptive conduct that causes them economic injury, the foregoing principles of law, worked out over generations, recognize the almost infinite variations of human language and non-verbal communication,[18] as well as the corresponding multitude of ways in which ingenious swindlers and con artists may defraud others.[19] Thus, in each case a determination of the meaning attributed to specific words and conduct depends not just on the language used, but also on how such language is reasonably interpreted by the listener in the specific context of the particular facts and circumstances of the situation.[20] It is for this reason that cases like the present one should be tried, not dismissed on the pleadings.

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[18] See *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.); *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 426-27 (1992) (Stevens, J., concurring); *Ollman*, 750 F.2d at 978.

[19] See *McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000) ("Fraud . . . embraces all the multifarious means which human ingenuity can devise . . . to gain an advantage over another by false suggestions or by the suppression of truth.") (Posner, J.); *Kugler v. Romain*, 58 N.J. 522, 544, 279 A.2d 640, 652 (1971) ("[f]raud is infinite in variety"); *American Law of Torts* § 32:5 ("fraud is ever assuming new forms").

[20] Succinctly expressing this point, *Bigelow* states (at 503):

> The rule fixing liability for false representations . . . is not to be evaded by any suggestion that the representation is capable of being understood, as by a merely literal interpretation, or by some forced meaning, in a sense to make it true. If it wear a garb which under the circumstances would deceive a man of fair intelligence, it is false under the law.

C. Deceptive Half-Truths About How Charitable Donations Will Be Used Are Not Constitutionally Protected Speech.

Against this legal background, the Court's prior decisions strongly indicate its rejection of the notion that charitable solicitation fraud accomplished by means of an *implied* misrepresentation is protected speech or that government has no legitimate interest in prohibiting it. In *Riley*, the Court affirmed that States may "vigorously enforce [their] antifraud laws to prohibit professional fundraisers from obtaining money *on false pretenses* or by making false statements." 487 U.S. at 795 (emphasis added). In *Schaumburg* the Court recognized the States' power to prohibit and punish "fraudulent misrepresentations," 444 U.S. at 637, and commented approvingly on a law making it "unlawful for a . . . solicitor to *cheat, deceive or fraudulently misrepresent*." *Id.* at 637 n.11 (emphasis added). In making these statements, the Court did not suggest that it intended to depart from the common meaning of these terms by limiting them to explicit misstatements, as opposed to deceptive half-truths and other types of implied falsehoods long recognized in the law of fraud. See also *Watchtower Bible & Tract Society*, 536 U.S. at ___, 122 S. Ct. at 2087-88 (acknowledging the government's ability "to protect its citizens from fraudulent solicitation") (citing *Cantwell*, 310 U.S. at 306; *Bronston*, 409 U.S. at 358 n.4 (distinguishing the strict standard for establishing perjury under 18 U.S.C. § 1621 from the criminal law regarding fraudulent statements, which includes the "intentional creation of false impressions by a selection of literally true representations").

If, however, the Court's prior decisions leave any doubt on the subject, it should now squarely hold that fraudulent charitable solicitations—*including* ones based on implied misrepresentations—are unprotected speech, and that States therefore may pursue a fraud action against a fundraiser who

represents that donations will be used for specific charitable purposes but actually keeps the vast majority of the money donated for those purposes. Words used to obtain property that reasonably imply verifiably false facts constitute an affront to society's fundamental moral values and make no meaningful contribution toward an accurate understanding of actual conditions and events. Cf. *Gertz*, 418 U.S. at 340; *Chaplinsky*, 315 U.S. at 572. Unlike pure opinions and ideas, statements that are reasonably understood to imply untrue facts do not qualify as protected speech merely because the author refrains from asserting those facts explicitly. Cf. *Milkovich*, 497 U.S. at 18-21; *Riley*, 487 U.S. at 803 (Scalia, J., concurring). No constitutional premium therefore attaches to deception for pecuniary gain merely because it is accomplished by artful or clever means. Cf. *American Home Products Corp.*, 577 F.2d at 165 (observing that limiting fraud liability to "literal falsehoods" simply shields from scrutiny the "clever use of innuendo, indirect intimations, and ambiguous suggestions . . . when protection against such sophisticated deception is most needed.").

II. Illinois' Individual Fraud Action Against Respondents Represents a Narrowly Tailored Means to Further its Substantial Interest in Prohibiting the Solicitation of Charitable Donations by Fraudulent Means.

As unprotected speech, fraudulent charitable solicitations may be prohibited by means that are "narrowly tailored" to further the State's objective, *Riley*, 487 U.S. at 792, and that do not "unduly . . . intrude upon the rights of free speech," *Schaumburg*, 444 U.S. at 633. In *Schaumburg*, *Munson* and *Riley* the Court specifically indicated that individual fraud actions are a narrowly tailored means to achieve the States' legitimate goal of combating charitable solicitation fraud. *Riley*, 487 U.S. at 795, 800; *Munson*, 467 U.S. at 961 n.9; *Schaumburg*, 444 U.S. at 637 and n.11. Illinois' fraud action

against Respondents therefore represents exactly what the Court has said was permissible, and the Court should now specifically hold that an individual fraud action like the one Illinois initiated here satisfies the First Amendment.[21]

A. The First Amendment's "Narrowly Tailored Means" Standard Only Requires Substantive and Procedural Rules that Avoid Infringing a Substantial Amount of Protected Speech.

"There is always in litigation a margin of error." *Speiser v. Randall*, 357 U.S. 513, 525 (1958); see also F. Schauer, *Fear, Risk and the First Amendment: Unravelling the*

[21] The gist of Illinois' fraud action is not that, because Respondents take 85 percent of all donations (and VietNow then devotes only *one-fifth* of the remaining 15 percent—or *3 percent of the total*—to charitable programs of any kind, including public education efforts), it is therefore fraudulent even for them *generally* to solicit donations "for" charity. See *Schaumburg*, 444 U.S. at 637 (noting distinction between bona fide charities with high expenses for education, research, education and "organizations . . . that in fact are using the charitable label as a cloak for profitmaking"); *Munson*, 467 U.S. at 961; *Riley*, 487 U.S. at 804 (Scalia, J. concurring). Such a claim is certainly plausible, and perhaps even compelling in the present situation. (VietNow's annual IRS Form 990 for the year 2000, showing that it had revenues of more than $3.5 million but devoted only about $118,000—or approximately *three percent* of its revenues—to "program services," is available on the internet at http://justice.hdcdojnet.state.ca.us/charitysr/default.asp.) Illinois' claim in *this* case, though, is based on Respondents' *actual* representations that donations would be spent on *specific* charitable uses, such as providing food, shelter and financial support to needy veterans. This claim is further supported by the fact that although Respondents obtained a higher yield from their fund-raising efforts by repeatedly calling the same donors, they still turned over only 15 percent to VietNow and continued to make the same representations to these donors about how their contributions would be used.

"Chilling Effect," 58 B.U. L. Rev. 685, 694-705 (1978) (*"Unravelling the Chilling Effect"*); cf. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596-97 (1993). Even when First Amendment rights are at issue, therefore, the Constitution does not require rules that eliminate *any* possibility of civil or criminal liability being imposed on speech that is, in fact, protected. Nor does the Constitution demand rules under which those who engage in protected expression are *never* subject to judicial proceedings brought to determine whether their speech is actually unlawful. Obviously, such rules would, through protective overkill, virtually eliminate society's ability to prohibit unprotected speech.

Acknowledging this practical reality, the Court has held that, where the law must distinguish between protected and unprotected speech, the First Amendment requires rules which do not prohibit or deter a "substantial amount" of protected speech, *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, ___, 122 S. Ct. 1389, 1404 (2002), yet which at the same time respect society's legitimate interest in prohibiting unprotected speech. See *Waters v. Churchill*, 511 U.S. 661, 670-71 (1994); *Burson v. Freeman*, 504 U.S. 191, 206-211 (1992); *Milkovich*, 497 U.S. at 22; *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (noting that the First Amendment calls for rules that "protect[] against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights"). The proper application of these principles to a particular question thus depends on the effect each of the alternatives would have on protected speech rights *and* on the government's ability to accomplish its legitimate objectives. For each possible rule, this necessarily entails an evaluation of the *likelihood* that protected speech will be prohibited or deterred and the potential *severity* of that invasion of free speech rights, taking into account the nature of the speech likely to be affected. *Denver Area Educ.*

Telecomm. Consortium v. Federal Communications Comm'n, 518 U.S. 727, 752 (1996); *Waters*, 511 U.S. at 670-71; *Burson*, 504 U.S. at 198-211; *New York v. Ferber*, 458 U.S. 747, 769-72 (1982); *Miller v. California*, 413 U.S. 15, 23-27 and n.5 (1973); see generally F. Schauer, *Unravelling the Chilling Effect*, 58 B.U. L. Rev. at 694-705.

When the government or another party seeks to subject speech to adverse legal consequences on the ground that it is unprotected, the law relies on two principal means to minimize the risk of erroneous determinations and, thereby, to ensure the greatest possible accommodation between competing free speech and governmental interests: *first*, substantive rules defining the category of unprotected speech that are as definite as the subject matter allows; and *second*, procedures designed to safeguard against the incorrect application of those rules to particular controversies. As the following discussion explains, both of these are more than adequately provided by the substantive and procedural rules governing Illinois' fraud claim against Respondents. Respondents demand still more, however, insisting that even *unprotected* speech consisting of fraud accomplished by half-truths or other implied misrepresentations must be exempt from any liability. That argument is unconvincing.

B. The Procedures Attendant to Illinois' Fraud Action Against Respondents Satisfy the First Amendment.

The Court's precedents establish that the procedure normally required for determining whether particular speech is unprotected is a trial conducted *after* the speech occurs in which the party challenging the speech bears the burden of proof, and at which the relevant facts are determined by a judge or jury in accordance with the established definition of unprotected speech (or protected speech), subject to independent judicial review. See, *e.g.*, *Ferber*, 458 U.S. at 767-78, 773-74; *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994)

(Blackmun, J., Circuit Justice); see also *Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989); *Broadrick v. Oklahoma*, 413 U.S. 601, 615-616 (1973); *Miller*, 413 U.S. at 23-27 and n.5; H. Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1977); L. Tribe, *American Constitutional Law* § 12-37 at 1054-55 and n.1 (2d ed. 1988). There is no question that all of these procedural protections were included in Illinois' fraud action against Respondents.[22] The only issue here, then, concerns the constitutional validity of the relevant substantive law to be applied.

C. The Well-Established Legal Definition of a "Misrepresentation" Provides Fair Notice of What Conduct is Proscribed.

Vagueness concerns do not justify barring *any* power by the State to impose liability for charitable solicitation fraud based on implied misrepresentations of verifiably false fact. The limits of constitutionally protected speech or conduct are seldom susceptible to mathematically precise definitions. See *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) ("we can never expect mathematical certainty from our language"); *Arnett v. Kennedy*, 416 U.S. 134, 161-64 (1974); *Miller v. California*, 413 U.S. at 25 n.7. Accordingly, when speech may be prohibited, the First Amendment requires only that the substantive rule of law applied, whether prescribed by statute or common law or supplied directly by

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[22] Although Illinois' complaint contained a prayer for both preliminary and permanent injunctive relief, J.A. 12-13, Illinois never moved for a preliminary injunction, and the lower courts' rulings did not decide what limits the constitution may impose on the *remedies* available against a person who commits fraud while soliciting charitable donations, but instead held that the First Amendment barred *any* recovery against Respondents. Questions relating to the remedies available if Illinois' action may proceed therefore are not appropriately presented for consideration here.

the constitution, must provide "fair notice" as to what is proscribed. See *Grayned*, 408 U.S. at 108-11 and n.15 (citation omitted); see also *City of Chicago v. Morales*, 527 U.S. 41, 56-60 (1999) (plurality opinion); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048-49 (1991); *Arnett*, 416 U.S. at 161-64.

Such notice is adequately provided by the well-established definition of a "misrepresentation" in the law of fraud, which has been given a particularized meaning over the course of decades of judicial rulings. The Court has frequently emphasized that vagueness concerns in the First Amendment context are alleviated where a law has received an authoritative judicial construction. See, *e.g.*, *Osborne v. Ohio*, 495 U.S. 103, 115-16 and n.12 (1990); *Ferber*, 458 U.S. at 764. That is unquestionably the case with respect to the legal definition of a fraudulent misrepresentation. See, *e.g.*, *Neder*, 527 U.S. at 22 (noting that already "in 1872 . . . actionable 'fraud' had a well-settled meaning at common law"). Indeed, the definition of what constitutes a misrepresentation is one of the most exhaustively addressed issues in the law. (See above at 15-21.)[23]

It is significant, too, that the long-established definition of a misrepresentation, elaborated and refined by years of jurisprudence, strikes a finely wrought balance between the

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[23] There is no merit to the suggestion that permitting fraud liability to be based on *implied* misrepresentations will invite the arbitrary prosecution of charities whenever the Attorney General believes their fund-raising expenses are "unreasonable." What is important under the law of fraud, and what Illinois alleged here, is not what the Attorney General *believes* in the abstract, but what the victims *specifically understood* based on what Respondents *actually told them*. And where, as here, the alleged misrepresentation relates to how donations will be spent, not some ideological view or issue of general public concern, "there is no realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 390.

rights and interests of both "speakers" and "listeners." This definition therefore already carefully accommodates the competing concerns of unrestricted speech and protecting society against deceit for pecuniary gain. That definition should not lightly be set aside on "vagueness" grounds in favor of an essentially untested and undeveloped alternative. And neither the record in this case nor common experience supports the conclusion that the current application of this long-established body of law presents a serious threat to protected speech rights in the area of charitable solicitations.

The Court's decision in *Riley* does not warrant a different conclusion. In that case the Court invalidated a statute under which a fundraising fee above 35 percent of the gross revenues raised for charity was "presumed unreasonable," but the fundraiser could "rebut" the presumption by showing that the fee was necessary due to enable the charity to raise money or to disseminate information or advocacy to the public. *Riley*, 487 U.S. at 785. Even when this presumption was rebutted by showing that the solicitation involved the advocacy or dissemination of information, the factfinder still had to decide whether the fee was "reasonable." *Id.* at 786. The Court held that, in addition to impermissibly imposing on the fundraiser the legal burden of proving the lawfulness of its speech, *id.* at 793, the statute failed to provide any meaningful guidance as to what would be considered "reasonable." *Id.* at 793-94. In response to the State's arguments that "standards for determining '[r]easonable fundraising fees will be judicially defined over the years,'" the Court stated that the *presently* unsettled state of the law would present fundraisers with intolerable uncertainty regarding the lawfulness of their conduct. *Id.* at 794.

The factors leading to that conclusion in *Riley* are absent in the present case. Illinois' claim is not based on some nebulous test of "reasonableness" lacking any equivalent in other established bodies of law; it is based on the concept of

a "misrepresentation," which is widely used throughout law. In addition, as noted above, the common law definition of what constitutes a misrepresentation is not undeveloped by the courts, but on the contrary is one of the most thoroughly examined questions in the law. The Court should therefore reject Respondents' contention that limiting liability for charitable solicitation fraud to *explicit* misrepresentations is the only way to avoid prohibiting a substantial amount of protected speech.

D. Deceptive Charitable Solicitations Do Not Merit "Strategic Protection" Under the First Amendment.

Unprotected speech in the form of fraudulent charitable solicitations based on deceptive half-truths or other implied misrepresentations is not entitled to First Amendment immunity as a matter of "strategic" constitutional protection. When the substantive definition of unprotected speech provides fair notice and the procedural requirements for adjudicating the speech's status are consistent with First Amendment standards, only in very limited circumstances do free speech concerns require an additional *substantive* accommodation for free speech interests under which liability is excluded for admittedly *unprotected* speech. As a general matter, "[o]nce specific expressional acts are properly determined to be unprotected by the first amendment, there can be no objection to their subsequent suppression or prosecution." L. Tribe, *American Constitutional Law* § 12-37 at 1054-55. In occasional, specific situations, the First Amendment requires that even unprotected expression receive "strategic protection" from liability in order to ensure adequate security for protected speech. *Gertz*, 418 U.S. at 342. Such protection is not warranted, however, for fraudulent charitable solicitations practiced by means of half-truths or similarly implied misrepresentations of untrue facts.

The situations in which the Court has ruled that even unprotected speech must be insulated from legal liability present unique factors not present here. Each of those situations involves speech about elections, government officials and operations, or similar matters of substantial public concern. See, *e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (requiring a public official bringing a defamation claim against a media defendant to prove that the defendant knew the statement was false or entertained substantial doubts as to its truth); *Gertz*, 418 U.S. at 339-48 (requiring a private defamation plaintiff suing a media defendant about a matter of public concern to prove at least negligence by the defendant regarding the falsity of the statement); *Brown v. Hartlage*, 456 U.S. 45 (1982) (precluding liability without fault for electoral candidate's campaign promise that could not legally be fulfilled). The Court has recognized that speech of this variety lies at "the heart of the First Amendment," *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988), where its "protection is 'at its zenith.'" *R.A.V.*, 505 U.S. at 429 (quoting *Meyer v. Grant*, 486 U.S. 414, 425 (1988)) (internal brackets omitted); see also *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346-47 (1995). The relevant interests are entirely different, however, where the claim in question asserts that the defendant made a misrepresentation of fact for the purpose of obtaining someone else's money.

In suits like the present one, therefore, liability may validly be determined by applying the well-established legal definition of a "misrepresentation." The First Amendment does not require this definition to be narrowed with a "buffer zone" that would place beyond the States' police power all charitable solicitation fraud that does not resort to outright lies. The considerations that require such "breathing room" elsewhere do not even remotely justify the drastic displacement of long-established fraud principles that Respondents advocate here. (See Brf. in Op. 7.)

E. The Court's Defamation Law Precedents Militate Against Establishing First Amendment Immunity for Implied Misrepresentations by Charitable Solicitors.

The Court's First Amendment jurisprudence in the area of defamation law is particularly relevant to the issue presented here and well illustrates why the Constitution does not require total immunity for implied misrepresentations of fact made for the purpose of obtaining money in the name of charity. The Court has held that, where an alleged defamatory statement involves a public figure or matter of public concern, the Constitution excludes the imposition of liability unless the defendant's *belief* as to whether the statement is true reflects some degree of fault. *New York Times v. Sullivan*, 376 U.S. at 279-80; *Gertz*, 418 U.S. at 339-48. The Court has taken an entirely different approach, however, with respect to whether the allegedly defamatory *statement* is false. That question requires a comparison of the actual facts with the *meaning* of the defendant's statement—which is essentially the same inquiry as the one made in a fraud action to determine whether the defendant's words or actions constitute a "misrepresentation." On that issue, the Court has repeatedly recognized that the constitution does not categorically exclude liability for statements that reasonably imply a verifiably false statement of fact.

In *Milkovich*, 497 U.S. 1 (1990), the Court rejected the notion that the First Amendment categorically precludes defamation liability in favor of a public figure "for anything that might be labeled 'opinion.'" 497 U.S. at 18. Pointing out that "expressions of 'opinion' may often imply an assertion of objective fact," *id.*, the Court held that, if the requisite degree of fault concerning the falsity of the statement is established, liability may arise from a statement which, even if it is expressed as an opinion, "*reasonably implies* false and defamatory facts." *Id.* at 20-21 (emphasis added); see also *id.*

at 20 n. 7 (the issue of falsity relates to defamatory facts *implied* by a statement) (emphasis added, original emphasis omitted). To sustain such a claim, the Court held, the statement must "contain a provably false connotation." *Id.* at 20. A triable claim is presented, however, if these requirements are met and a "reasonable factfinder could conclude that the statements . . . imply" an assertion that is "sufficiently factual to be susceptible of being proved true or false." *Id.* at 21.

The Court's subsequent decision in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), reaffirmed that even defamation claims by public figures against media defendants are permissible where the defendants' statements "might reasonably be construed to state or imply factual assertions that are both false and defamatory." 501 U.S. at 518. Significantly, the Court rejected a view under which the constitution foreclosed liability as long as there was a "rational interpretation" of the statement that was true. *Id.* The Court's decisions in *Milkovich* and *Masson* thus recognize that the First Amendment does not shelter from liability statements that, viewed in the context of the circumstances in which they were made, convey a meaning by implication rather than by express affirmation.[24]

The distinction recognized in these cases between what a statement *means* and whether that meaning is *true* reflects the practical difference between the speaker's ability to

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[24] This approach is also followed where the "literal" meaning of a statement, which would be defamatory, is disregarded because it is not one reasonably attributable to it in the context in which it is made. Thus, for example, such statements do not trigger liability where they amount to mere "rhetorical hyperbole," *Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6, 14 (1970), or were made in jest. *Sack on Defamation* § 2.4.1; 1 R. Smolla, *Law of Defamation* § 6:90 (2d ed. 2001).

control the *meaning* reasonably attributable to his statements, and his ability to ensure that this meaning is factually *accurate*. Thus, when a journalist publishes a statement about a public figure or a matter of public concern, there are practical limits to his ability to be absolutely sure of the accuracy of the facts he reports, especially given the need to report on events while they are still newsworthy. The "actual malice" standard announced in *New York Times Co. v. Sullivan* specifically protects against this risk. By contrast, a person has a greater ability to control the meaning of what he says, and the First Amendment correspondingly does not erect immunity for statements that may reasonably be understood to imply a verifiably untrue fact, as that would merely protect assertions that actually damage another's reputation but do so by means of clever innuendo and artful insinuation. *Masson*, 501 U.S. at 516-18; *Milkovich*, 497 U.S. at 18-21.

The Court's refusal to construct a constitutional barrier to defamation liability for "implicitly" false statements of fact is particularly significant because, when the plaintiff is a public figure, he frequently has the ability to disseminate corrective information that would dispel any false impression created by the defendant's statement. See *Gertz*, 418 U.S. at 344. Even that protection for the listener is lacking in the case of fraudulent charitable solicitations, however. Such solicitations commonly involve one-on-one requests, either over the telephone or in person, for an immediate donation or pledge of funds. Unlike the circumstances surrounding a publicly broadcast defamatory statement about a public figure, that setting for charitable solicitations both increases the opportunity for deceptive abuses and reduces the likelihood that donors will receive any corrective information before deciding whether to make a gift. Cf. *Virginia Pharmacy Bd.*, 425 U.S. at 771 n.24. If statements that reasonably imply a verifiably false statement of fact are not exempt from defamation liability where they are published by the media

about a public figure, they certainly do not deserve that protection when made by a fundraiser who is attempting to get money from someone in a one-on-one conversation.[25]

F. Application of the Traditional Definition of a Fraudulent Misrepresentation Will Not Deter a Substantial Amount of Legitimate Charitable Solicitations.

There is no basis to conclude that application of the well-established definition of a fraudulent misrepresentation to charitable solicitations will deter a substantial amount of legitimate speech by charities or by others on their behalf. When a charitable fundraiser makes representations about how a charity uses contributions, he presumably has complete access to the relevant facts, enabling him to avoid any misleading or deceptive statements. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504 n.22 (1984); *Central Hudson Gas & Elec. Corp. v. Public*

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[25] By contrast, an analogy to the realm of electoral speech is inapposite. Although several lower court cases have held that greater tolerance for misleading statements of fact is required where campaign speech is involved, see, *e.g.*, *Weaver v. Bonner*, 309 F.3d 1312, 1319-20 (11th Cir. 2002); *Briggs v. Ohio Elections Comm'n*, 61 F.3d 487, 494 (6th Cir. 1995); but see *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973) (*per curiam*); *Tomei v. Finley*, 512 F. Supp 695, 698 (N.D. Ill. 1981), similar indulgence in the context of charitable solicitations is misplaced for several reasons. The public has historically entertained a high degree of skepticism about campaign speech and similar political debates; opposing candidates or partisans typically have the opportunity to correct any misleading impression before the public makes a decision based on the information, see L. Tribe, *American Constitutional Law* § 13-26 at 1132; cf. *Gertz*, 418 U.S. at 344; and the speaker is not trying to get someone to part with his money. Those considerations are absent where a private solicitation for an immediate charitable donation or pledge of money is involved.

Service Comm'n of New York, 447 U.S. 557, 564 n.6 (1980); *Virginia Pharmacy Bd.*, 425 U.S. at 771 n.24. The donor, by contrast, has both less knowledge and less access to information necessary to correct any inaccurate or misleading statements by the fundraiser. In these circumstances, the law cannot look solely to the interests of the "speaker," but must also take into account the interest of the "listener" in accurate, non-misleading information. See *Central Hudson* , 447 U.S. at 563; see also *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) ("False statements of fact harm . . . the readers of the statement."). This is especially true where the solicitation occurs in a one-on-one interaction in which the speaker has an immediate financial stake in the outcome of the communication and requests the donor to make an immediate decision to give money.[26]

In any event, the potential impact of any such chilling effect would seem to be minimal, at best. The chilling effect

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[26] It is open to question whether chilling analysis even applies to claims that a charitable solicitor fraudulently misrepresented how donations would be used. In *Schaumburg* the Court held that charitable solicitations should not be treated as merely commercial speech because they often combine a simple request for money with political advocacy or the dissemination of educational information. 444 U.S. at 632. That general assumption is perfectly appropriate for a facial challenge to a sweeping statute regulating broad categories of charitable fundraising activity without regard to its content. It has less strength, however, in an individual fraud action where the alleged misrepresentation made for the purpose of inducing another person to give the defendant money involves *how* that money will be spent, not *why* it will be spent (*i.e.*, is not speech embodying public advocacy or education regarding matters of general public concern). Cf. *Calder v. Jones*, 465 U.S. 783, 790-91 (1984) (rejecting as "double counting" an argument for additional First Amendment analysis as part of personal jurisdiction inquiry); *United States v. Freeman*, 761 F.2d 549, 551-52 (9th Cir. 1985) (Kennedy, J.).

or *protected* speech resulting from a law that specifically targets *unprotected* speech typically operates on the "margins" of prohibited speech. See *Arnett*, 416 U.S. at 163; *Miller*, 413 U.S. at 28 n.10; *United States v. Harriss*, 347 U.S. 612, 626 (1954); *Speiser*, 357 U.S. at 525; F. Schauer, *Unravelling the Chilling Effect*, 58 B.U. L. Rev. at 696. It is the value of *that* speech which must be considered when evaluating whether the law excessively invades free speech rights. See *Ferber*, 458 U.S. at 762-63 (plurality opinion); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion); see generally F. Schauer, *Unravelling the Chilling Effect*, 58 B.U. L. Rev. at 691-92. Chilling concerns are accordingly reduced in cases like the present one, since any protected speech by charitable solicitors that might be deterred by leaving intact the traditional definition of a misrepresentation is speech bordering on actual fraud regarding how solicited donations will be used.

G. Any Advocacy or Dissemination of Educational Information by Respondents Does Not Immunize Them from Fraud Liability for Misrepresenting How Donations Will Be Used.

That Respondents or VietNow may also have engaged in some advocacy or the dissemination of educational information on behalf of veterans' interests does not defeat Illinois' right to complain that Respondents' *actual* statements to donors concerning the specific ways their contributions would be used constituted fraudulent misrepresentations. The basis for the State's claim is not that any educational information distributed by Respondents was inaccurate; it was that what they specifically told donors about how their contributions would be used was fraudulent. The existence of any such educational information (the nature and quantity of which is not established by the record, but appears to be exceedingly modest, see above at 24, n.21) therefore cannot operate to insulate Respondents from liability for misrepresentations to

donors that have nothing to do with such educational or polemical objectives. Cf. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68 (1983) ("Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.")[27] Illinois' claim thus bears no resemblance to the regulations invalidated in *Schaumburg*, *Munson* and *Riley*, which limited *all* speech, regardless of its content, based solely on the percentage of revenues devoted to fundraising.[28] The trial of *this* case will not implicate the value of helping veterans. (See also below at 39-40.)

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[27] In a similar context, the court observed in *United States v. Hildebrand*, 152 F.3d 756 (8th Cir. 1998):

> These defendants . . . argue that . . . their actions were motivated by a political objective, namely, to overhaul the monetary system. However, they were charged with mail fraud and money laundering, not anti-government speech. Their speech was challenged only to the extent that they fraudulently solicited claims.

152 F.3d at 765; see also *United States v. Freeman*, 761 F.2d at 552; Cf. *Miller v. California*, 413 U.S. at 25 n.7. None of the donors who submitted the affidavits attached to the complaint said they were told their money was going to be used to pay for public education or advocacy efforts. J.A. 107-194. Such expression by Respondents, to the extent is existed, therefore raises no free speech implications in this case.

[28] Illinois acknowledges the Court's observation in *Schaumburg* that charitable solicitations are entitled to heightened scrutiny for the additional reason that they provide the necessary resources for education and advocacy. *Schaumburg*, 444 U.S. at 632. This of course does not mean that the First Amendment protects *unlawful* means to obtain such resources or validates the diversion of contributions specifically solicited and given for the relief of human suffering to general public education or advocacy.

H. Precluding Liability for Charitable Solicitation Fraud Accomplished with Deceptive Half-Truths and Similar Implied Misrepresentations Would Critically Impair the States' Substantial Interest in Preventing Actual Fraud.

An additional reason why the First Amendment does not require insulating fundraisers from fraud liability unless they resort to blatant lies is that such a restriction would dramatically impair the States' ability to prevent actual fraud on the public. If implied fraud is constitutionally blessed, the available opportunities for exploitation of the public's desire to aid those in need and to support worthy causes will inevitably multiply. Given the complexity of language and human interaction, the permissible means to commit actual fraud without affirmatively stating literal falsehoods will be virtually limitless, and ingenious swindlers will face no effective restraint on their schemes.[29] The only real brake on such abuses—mounting public cynicism about *all* charities—will then hurt *bona fide* charities as much as unscrupulous individuals claiming to act for charitable purposes.[30]

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[29] The consequences of such a regulatory vacuum for charitable solicitations is graphically illustrated by Respondents' contention below that they would be immune from liability even if they kept 99 percent of all donations they solicited. (See above at 16.)

[30] This Court has long recognized the inherent sovereign authority of States to supervise the administration of assets given for charitable purposes. *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 127, 188-97 (1844) (Story, J.). That authority, exercised in Illinois by the Illinois Attorney General under common law and statute, includes ensuring the proper application of assets given for specified charitable uses and thereby protecting the interest of the people of the State in receiving the benefit intended for them. See 760 Ill. Comp. Stat. 55/12 (2000); *In re Estate of Laas*, 171 Ill. App. 3d 916, 920-21, 525 N.E.2d 1089, 1092-93 (1988); *People ex rel. Scott v.*

(continued...)

The First Amendment should not codify a falsely appealing philosophy that ignores how people actually respond to charitable appeals. An unrealistically harsh principle of "caveat donor" would merely create a self-fulfilling prophesy of donor cynicism. As the Court has observed: "People have a right to assume that fraudulent advertising traps will not be laid to ensnare them. 'Laws are made to protect the trusting as well as the suspicious.'" *Donaldson*, 333 U.S. at 189 (quoting *Federal Trade Comm'n v. Standard Educ. Society*, 302 U.S. 112, 116 (1937)). That same observation is just as valid, if not more so, when it comes to appeals for charitable gifts. See Note, *Developments in the Law, Nonprofit Corporations*, 105 Harv. L. Rev. 1578, 1635 (1992) ("Donor ire is aroused time and again by media exposés of solicitation campaigns in which a charity has received only five cents on the dollar"). The free speech clause should not be transformed into a license for unscrupulous fundraisers to defraud the public in the name of raising money for charity.

III. Illinois' Claim Against Respondents Does Not Impermissibly Rely on the Amount of Their Professional Fee to Establish Fraud.

Respondents argued below, and the Illinois Supreme Court agreed, that the State's claim against Respondents relies on their fee in several ways forbidden by the First Amendment. These contentions are neither persuasive nor supported by this Court's precedents.

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[30] (...continued)
George F. Harding Museum, 58 Ill. App. 3d 408, 413, 374 N.E.2d 756, 760 (1978). There is not an unlimited supply of charitable donations, and these responsibilities of the Illinois Attorney General on behalf of the State's citizens are appropriately furthered by the type of action brought here, which both directly and indirectly promotes the integrity of charitable assets and public trust in philanthropic organizations.

A. Illinois' Fraud Action Does Not Regulate the "Reasonableness" of Respondents' Fee.

It is important to clarify as an initial matter that Illinois is pursuing a claim of *actual fraud* against Respondents, not attempting to regulate the "reasonableness" of their fee. In *Schaumburg*, *Munson* and *Riley*, the Court sustained facial challenges to statutes under which charitable fundraising expenses above a certain percentage (which in those cases ranged from 25 percent to 35 percent) were declared *per se* unlawful or shifted to the fundraiser the burden of proving that its fee was "reasonable." Two principal justifications were offered in defense of those statutes: maximizing the amount of money actually devoted to charitable activities, and protecting the public from fraud. See *Riley*, 487 U.S. at 789-90, 792; *Munson*, 467 U.S. at 966 n.4. Addressing the first justification, *Munson* declared that "[t]he percentage limitation is too imprecise a tool to achieve that purpose." 467 U.S. at 966 n.14. The Court in *Riley* reaffirmed this holding and went even further, rejecting as constitutionally unsound the "paternalistic premise" that government, not charities themselves, knows best what charities should say and how they should say it. 487 U.S. at 790-91. These holdings, which Illinois does not challenge here, have no bearing on its claim of actual fraud against Respondents. What *is* relevant in those opinions is the Court's repeated affirmation that States need not "sit idly by and allow their citizens to be defrauded," but instead are fully entitled to "vigorously enforce [their] antifraud laws." *Id.* at 800. That is precisely what Illinois is doing in this case.

The common feature of the laws struck down in *Schaumburg*, *Munson* and *Riley* is that they declared charitable solicitations unlawful based solely on how donations were *spent*, regardless of what donors were *told*. Thus, if the statutory fundraising limits were exceeded, those statutes prohibited charitable solicitations even by fundraisers who

fully and accurately disclosed exactly how donations would be used. This, as the Court noted, did not correspond closely with the asserted purpose of targeting actual fraud.

Illinois' present action, by contrast, focuses on how Respondents *solicited* charitable contributions, and in particular on whether the specific representations they made about how contributions would be used were deceptive. Whether Respondents *actually* committed fraud depends on what the public reasonably understood by Respondents' representations, whether that was true, and whether Respondents intended donors to rely on their representations—not on whether VietNow's decisions about how to *spend* the revenues generated by Respondents' fundraising activity can be characterized as "unreasonable." Such a claim does not constitute an attempt to regulate the reasonableness of Respondents' fee.[31]

B. Respondents' Fundraising Fee is Not Irrelevant to Whether They Committed Fraud.

Having alleged that Respondents' statements to donors about how donations would be spent constituted fraudulent misrepresentations in light of the negligible amount actually used for those purposes, Illinois may naturally support its claim with evidence of the fundraising fees Respondents actually receive under their contracts with VietNow. Respondents suggest that the First Amendment precludes Illinois from using their actual fee in this way, and even makes a

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[31] Because Illinois' objective is to protect the *public* from fraud, not to protect *charities* because they supposedly "are economically unable to negotiate fair or reasonable contracts without governmental assistance," *Riley*, 487 U.S. at 790, it is no answer to Illinois' claim that *VietNow* consented to Respondents' fee. *Respondents' statements to donors* do not cease being misrepresentations simply because, unbeknownst to them, *VietNow* agreed with *Respondents* that their contributions would be used in some other way.

fundraiser's fee categorically irrelevant, as a matter of constitutional law, to whether it commits fraud. This suggestion is unfounded.

The Court's precedents clearly hold that the law cannot declare a fundraiser's fee *alone* to be unlawful. See, *e.g.*, *Munson*, 467 U.S. at 961 (noting *Schaumburg*'s holding that there is no "*necessary* connection" between high fundraising fees and fraud) (emphasis added); *id.* at 966 (reaffirming that high solicitation costs are not an "accurate measure of fraud"); *Riley*, 487 U.S. at 794 n.8 (concluding that fraud cannot be presumed from the "*surrogate* and imprecise formula" of a fundraiser's fee) (emphasis added). These decisions just as clearly do *not* hold, however, that fundraising fees constitute a special constitutional category of facts that are *irrelevant* to whether fraud occurred in a specific case. It is one thing to say that a high fee *by itself* cannot establish fraud, which the Court's precedents support. It is quite another to say that such a fee is *never* relevant to whether actual fraud occurred in a given situation. That proposition finds no support in this Court's decisions.[32]

One of the key issues in dispute in any claim alleging a fraudulent misrepresentation is whether the meaning reasonably conveyed to donors by the defendant's statements materially differs from the truth. If, as in this case, the

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[32] No different conclusion can be drawn from *Riley*'s reference to the "clear holding in *Munson* that there is no *nexus* between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent." 487 U.S. at 793 (emphasis added). Read in context, this shorthand description of *Munson* clearly was not intended to go beyond the Court's actual holdings in *Schaumburg* and *Munson* that a fundraising percentage is not enough, *in and of itself*, to establish fraud, and that the vice of those statutes was that, ostensibly in the name of preventing fraud, they "aimed at something else in the hope that [they] would sweep fraud in during the process." *Munson*, 467 U.S. at 969-70.

representation involves how charitable donations will be used, it is of course relevant to show that they were not actually devoted to those uses because, except to an insignificant degree, they instead went to a professional fundraiser.

Illinois' complaint alleged that Respondents told donors their money would be used for specific charitable purposes, and that these donors, while presumably assuming that *some* of their contributions would go to fundraising or administrative costs, reasonably understood that "*much more*" than 15 percent of their donations would actually be used for those purposes. J.A. 20, 87-88, 104. The State further specifically alleged that Respondents withheld from donors how much of their contributions was actually devoted to these uses for the purpose of inducing them to make a contribution in reliance on the false impression created by what Respondents *did* say. J.A. 86, 104. Illinois is accordingly entitled to support its claim that those representations are false with evidence that only an insubstantial portion of donations was actually used as Respondents represented. A contrary rule would make no sense, for how donations are used is often the most important factor in a person's decision to make a gift. Indeed, Respondents seemingly concede that their fundraising fee would be admissible in a fraud action against them if they affirmatively misstated that fee. (Brf. in Op. 28.) If this is true, however, their fee cannot be categorically *irrelevant* to whether they committed fraud.

C. Illinois' Claim Against Respondents Does Not Rest Upon Any Legal "Presumption" that the Amount of Their Fee Makes Their Solicitations Fraudulent.

Illinois' allegation that Respondents' representations were false because they kept 85 percent of all donations likewise does not rely on any legal "presumption" of fraud, *i.e.*, a rule of law that imposes on Respondents the *burden of disproving* their liability. There is therefore no relevant

comparison with the statutory provision struck down in *Riley* which (although it made the ultimate issue one of "reasonableness," not fraud) imposed on the fundraiser just such a legal burden. As noted above (at 29), under the statutory provision challenged in *Riley*, any charitable fundraising fee above 35 percent was "presumed unreasonable," and therefore illegal, but a fundraiser was allowed to "rebut the presumption" with other evidence. 487 U.S. at 784-86 and n.2. The effect of this provision was that the fundraiser would be found in violation of the law if the *only* evidence were its fee. For First Amendment purposes, the Court held, such a rule of law was no more valid than one declaring such a fee conclusive evidence of fraud. *Id.* at 793; see also *Speiser*, 357 U.S. at 525-26.

No similar legal principle applies here. Illinois is not proceeding under any law that declares solicitation costs above a certain percentage automatically or presumptively unlawful. The State is proceeding under the common law of fraud, as well as its generally applicable anti-fraud statutes, under which the plaintiff has the burden of proving all of the necessary elements. The fact that Respondents kept 85 percent of all donations does not create a legal "presumption" of fraud, but merely constitutes evidence of the truth concealed by misrepresentations that will be proved by other evidence. See generally 31A C.J.S. *Evidence* § 131 c (1996); cf. *Yates v. Evatt*, 500 U.S. 391, 402 n.7 (1991); *Barnes v. United States*, 412 U.S. 837, 841-45 (1973). There is no merit, therefore, to Respondent's contention that Illinois' fraud action unconstitutionally "presumes" that their fundraising fee establishes fraud.

D. Illinois' Claim Against Respondents Does Not, by Relying on the Information They Withheld to Establish They Made Fraudulent Misrepresentations, Constitute Unconstitutionally "Compelled Speech."

Finally, Illinois is not unconstitutionally "compelling" Respondents to disclose their fundraising fee in violation of the First Amendment. Nothing requires Respondents, when soliciting donations on behalf of VietNow, to tell potential donors their contributions will be devoted to specific charitable uses. That may be a natural selling point for any charity, and it can be expected that fundraisers will often wish to emphasize these uses to donors. If they do so, however, the First Amendment provides no refuge for misleading half-truths. Under well-established fraud principles, once a fundraiser chooses to disclose certain facts about the use of donations, it cannot withhold other facts in such a way that the public is given a false impression. (See above at 19-20.) If, as Respondents maintain, the Constitution required a contrary result, the First Amendment would simply become an engine for fraud clothed in the garb of free speech.

The statutory provision held invalid in *Riley* is readily distinguishable from the present situation. Under that provision, all employees of a professional fundraiser (but not of a charity) were required to disclose to potential donors their name, the name and address of their employer, and the average percentage of the fundraiser's gross receipts from in-state operations during the preceding year that was turned over to charities. *Riley*, 487 U.S. at 786. Significantly, this disclosure was mandated *before* the fundraiser requested a donation and *regardless of what else it said*. *Id.* The Court held that this requirement was invalid for two interrelated reasons. First, it represented a form of "compelled speech" contrary to the First Amendment's basic premise that government generally may not control the content of pro-

tected private speech. Second, it did not accomplish by narrowly tailored means the state's goal of providing donors more complete information regarding how contributions would be spent. *Id.* at 796-90.

The State's "prophylactic, imprecise, and unduly burdensome rule . . . adopted to reduce . . . alleged donor misperception," the Court explained, was both *overinclusive* in those situations "where the solicitation is combined with the advocacy and dissemination of information," in which case the charity benefits from the solicitation itself, and *underinclusive* because it excluded charities that directly incurred equally high fundraising costs without using professional fundraisers. *Id.* at 798-800. The means chosen by the State were also less vital to the accomplishment of its objective, the Court added, because for-profit fundraisers were already required to disclose their professional status, "thereby giving notice that at least a portion of the money contributed will be retained," and because "[d]onors are also undoubtedly aware that solicitations incur costs, to which *part* of their donation might apply." *Id.* at 799 (emphasis added).[33] The Court carefully emphasized the limited nature of its ruling, however, stating that "the State may vigorously

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[33] Justice Scalia, dissenting from the Court's statement that professional fundraisers could constitutionally be required to disclose their status, observed (487 U.S. at 803-04, emphasis added):

> Where core First Amendment speech is at issue, the State can assess liability for *specific* instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where *misleading* statements are not made. Since donors are assuredly aware that a *portion* of their donations may go to solicitation costs and other administrative expenses . . . it is not misleading in the great mass of cases for a professional solicitor to request donations "for" a specific charity without announcing his professional status.

enforce its antifraud laws to prohibit professional fundraisers from obtaining money *on false pretenses* or by making false statements." *Id.* at 800 (emphasis added).

Application of traditional fraud principles to proscribe deceptive half-truths and similar frauds is therefore entirely consistent with the First Amendment. Those principles do not impose the heavy hand of government on what fundraisers may say, and they are not designed to drive away donors *before* charitable solicitors have any opportunity to explain what a charity does or why it deserves support. Instead, by focusing specifically on any representations that are misleading because they constitute a deceptive half-truth, they represent a narrowly tailored means to further the State's interest in preventing actual fraud. In such limited circumstances, the First Amendment does not give fundraisers the constitutional right to withhold the "undisclosed half" (or, in this case, the undisclosed 85 percent) of a half truth. See *United States v. Harriss*, 347 U.S. at 625-26 (upholding disclosure obligations of the Federal Regulation of Lobbying Act because they did not forbid lobbying activities but only required the disclosure of information necessary to guard against the evil of "special interest groups seeking favored treatment while masquerading as proponents of the public weal"); see also *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 ("First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed").

In the present case, it was Respondents' *own* representation that donations would be used to provide food, shelter and other specific types of support for needy veterans that makes the nondisclosure of their 85 percent fee deceptive under traditional fraud principles. Permitting these principles to apply, as they do in all other situations, is not tantamount to unconstitutionally forcing specific speech on Respondents. Cf.

Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991) ("Minnesota law simply requires those making promises to keep them").[34]

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[34] Concerns about the infringement of free speech rights are also reduced because generally applicable fraud principles, by imposing liability in this manner, condemn *all* deceptive half-truths, not just ones of a particular viewpoint. Cf. *R.A.V.*, 505 U.S. at 385; *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 458 (1997) (holding that challenged agricultural marketing orders did not abridge free speech because, among other things, "they do not compel anyone to endorse or to finance any political or ideological views").

CONCLUSION

The judgment of the Illinois Supreme Court should be reversed.

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